Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CCBPol 97-4
Petition of MCI for	)	CC Docket No. 96-98
Declaratory Ruling	)	

BellSouth Comments

BellSouth Corporation, on behalf of BellSouth Telecommunications, Inc., ("BellSouth") submits these Comments in opposition to the Petition for Declaratory Ruling filed by MCI in the above-referenced proceeding.[1]

In its petition, MCI first asks the Commission to "hold that, as a general matter, intellectual property rights of third parties are not implicated in the sale of unbundled network elements."[2] Second, MCI asks the Commission to conclude that to the extent any third party intellectual property rights are implicated in the sale of unbundled network elements, the burden should fall upon the incumbent local exchange carrier to secure those rights on behalf of carriers requesting the unbundled network elements. For the reasons set forth below, the Commission should deny MCI's petition.

MCI rests its petition on the proposed Statement of Generally Available Terms (SGAT) filed by one incumbent LEC in two of its states and on an arbitration decision rendered in another

[1] Petition of MCI for Declaratory Ruling (filed March 11, 1997); *see*, Public Notice, DA 97-557 (rel. March 14, 1997).

[2] MCI Petition at 7.

of that LEC's states pursuant to Section 252 of the Communications Act. Section 252(e)(6),[3] however, vests federal district courts with jurisdiction to review whether any state approved SGAT or arbitrated agreement meets the requirements of Section 251 and 252. MCI's requested declaratory ruling would preempt this statutory review process. Moreover, it would do so without the benefit of any factual support. MCI would have the Commission declare on the basis of a narrow, but nonspecific, set of alleged circumstances that, as a rule, third parties do not have protectible intellectual property rights in technology supplied to incumbent LECs. Even if the Commission had the authority to limit the scope of third parties' property rights, which it does not, the Commission could not make such a determination without examining the contractual relationship between an incumbent LEC and each of its vendors.

A. MCI's Petition Attempts To Bypass Statutory Review Processes.

MCI identifies as the genesis of its petition certain conditions proposed by a single incumbent LEC in SGATs filed in two states[4] and similar conditions included within an approved arbitration decision in another state. Rather than pursue resolution of its concerns with these conditions within the framework established in Sections 251 and 252, MCI has asked the Commission to render a declaratory ruling, effectively bypassing the statutory review process established by Congress. Where Congress established processes precisely to accommodate review of concerns of the type MCI presents, the Commission should not countenance an end-run.

[3] 47 U.S.C. § 252(e)(6).

[4] MCI does not allege that these proposed conditions have been approved in the referenced states. See MCI Petition at 3.

The proper course is for MCI to pursue its concerns within the context of state regulatory proceedings in which any facts MCI desires to assert can be properly analyzed. The initial finding that MCI asks the Commission to make -- that third party intellectual property rights are not implicated in the sale of unbundled network elements -- is a very fact specific inquiry involving potentially complex issues of intellectual property law. Such an inquiry is not susceptible to a summary decision based on MCI's representations regarding a single LEC in a few of its states. To the extent MCI desires to challenge the reasonableness of that ILEC's position, it should be required to do so in the context of the proceedings established in the Act.

Thus, in states in which an incumbent LEC files proposed SGATs that MCI finds objectionable, MCI has the opportunity to intervene and address the reasonableness of the proposed terms. Similarly, MCI will have an opportunity to negotiate and, if necessary, arbitrate the terms of an individual agreement with an incumbent LEC if and "when [MCI] seeks to enter local markets"[5] by purchasing unbundled network elements. Either of these proceedings will present a forum in which MCI may attempt to present a fact-supported legal argument as to whether third party intellectual property rights are implicated in the sale of unbundled network elements. Moreover, in either case, in the event MCI is dissatisfied with the outcome of the state proceeding, it may "bring an action in an appropriate Federal court to determine whether the agreement or statement meets the requirements of section 251 and [section 252]."[6] The Commission should not allow MCI to circumvent this procedural structure through misuse of the declaratory ruling process.

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[5] MCI Petition at 5.

[6] 47 U.S.C. § 252(e)(6).

B. MCI Has Not Presented Any Basis Upon Which The Commission Can Render A Declaratory Ruling.

Pursuant to its rules, the Commission may issue a declaratory ruling to terminate a controversy or to remove an uncertainty.[7] MCI has provided inadequate information upon which the Commission would be able to make such a determination. Its Petition therefore should be rejected.

MCI asks the Commission to make a sweeping determination that third party intellectual property interests are not implicated in an incumbent LEC's sale of unbundled network elements. In order to make such a declaration, the Commission would either have to determine that no existing contract reserves for a third party any relevant intellectual property rights in technology provided to incumbent LECs or, alternatively, notwithstanding the language of any contract, that third parties as a matter of law are not permitted to protect their intellectual property interests through contracts with incumbent LECs. The former determination would require an extensive factual and legal analysis of existing contractual relationships; the latter would require the Commission to exercise authority it does not have.

With respect to the former consideration, MCI's position is inconsistent with pervasive business practices in high technology industries. While vendors will sell outright the physical equipment they manufacture, they routinely retain a variety of intellectual property rights associated with that equipment. These rights include copyrights on software, patents on the design of equipment or on the method by which it works, and technical information (*e.g.*, repair specifications, training materials, etc.) that may constitute protectible trade secrets. All of these rights are generally extended in only limited form via licenses to the buyer of the equipment, and

[7] 47 C.F.R. § 1.2.

are almost always further protected by associated nondisclosure agreements.[8] In order to conclude that none of these contractual arrangements for protecting the vendors' intellectual property interests is implicated when the incumbent LEC sells unbundled network elements, the Commission would have to examine each such arrangement. The Commission is likely precluded from undertaking such a review as a practical matter even if it were desirous of doing so. Nonetheless, in the absence of such a review, the Commission cannot make the sweeping determination MCI asks of it.

MCI's necessary alternative position is that whatever property or contract rights a third party may think it has asserted or protected in its dealings with an incumbent LEC, those provisions are all for naught. MCI, however, has identified no statutory provision or grant of authority to the Commission to deprive third parties of their protectible property interests. Yet, that would be the consequence of the holding requested by MCI. Of course, the Commission is precluded from taking such action where it does not have the authority.

Finally, MCI's Petition is merely speculative at this point. MCI does not allege that the cited SGATs have been approved in any state. Nor does MCI represent that it is a party to an arbitration proceeding or decision that includes the terms it criticizes. Rather, MCI seeks to have the Commission address a circumstance that does not present a ripe controversy or uncertainty,

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[8] Thus, MCI's assertion that the incumbent LEC always retains physical control over its network, MCI Petition at 7, is simply irrelevant to consideration of the bundle of intellectual property rights associated with the physical equipment. Moreover, MCI disingenuously suggests that the Commission has already determined that control over physical equipment necessarily includes control over the relevant intellectual property rights. *See,* MCI Petition at 8 ("As the Commission has noted, incumbent LECs control the essential facilities (including any intellectual property rights embedded in those facilities) needed to provide local phone service." *citing, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, FCC 96-325, at ¶¶ 410-11 (rel. Aug. 8, 1996)). Review of the cited portion of the First Report and Order reveals no such conclusion.

on the mere supposition of MCI's entry into local markets in Texas. Accordingly, MCI's petition should be dismissed.[9]

C. Where Third Party Intellectual Property Rights Are Implicated In The Sale Of Unbundled Network Elements, The Burden Should Not Fall On ILECs To Negotiate Rights On Behalf Of Requesting Carriers.

Where third party intellectual property rights are implicated in the sale of unbundled network elements, the burden should not fall on ILECs to negotiate rights on behalf of requesting carriers. MCI has presented no evidence that the requesting LEC will suffer an undue burden if it negotiates rights on its own behalf. Indeed, the solution imposed in the Texas arbitration decision cited by MCI appears to present a reasonable solution to MCI's request.

MCI's assertion that the cost would be "astronomical"[10] for a requesting carrier to negotiate its own right-to-use license, if one is necessary, simply has no support. Nor should MCI be able to keep a straight face with its assertion that "potential competitors," like itself, AT&T, Sprint, or other multi-billion dollar companies, are "not in a position to negotiate . . . advantageous licensing and right-to-use agreements."[11] Nor is there any reason to believe in light of this growing competition that incumbent LECs will have any ability to cause vendors not to grant licenses to competitors.[12] In short, MCI's attempt to conjure up reasons it should not obtain its own intellectual property licenses, where necessary, proves to be nothing but smoke and mirrors.

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[9] *See, Omnipoint Communications, Inc., Amendment of the Commission's Rules to Establish New Personal Communications Services*, 11 FCC Rcd 10785, 10789 (1996) (petition for declaratory ruling denied where issue was not yet ripe for Commission review).

[10] MCI Petition at 5.

[11] MCI Petition at 8.

[12] MCI Petition at 5.

Moreover, the outcome of the Texas arbitration decision cited by MCI ensures that requesting carriers are not simply left guessing whether they need to pursue any third party licensing arrangements. Instead, the incumbent LEC is charged with apprising the requesting carrier of possible licensing needs and with using best efforts to facilitate the obtaining of needed licenses by the requesting carrier, thus limiting the scope of the requesting carrier's "burden." Such an approach imposes an unreasonable burden on *neither* the incumbent LEC nor the requesting LEC -- while simultaneously ensuring that the third party intellectual property owner is free to exercise control over that property -- and thus properly balances the interests of all parties involved.

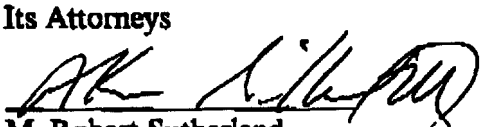
CONCLUSION

For the foregoing reasons, the Commission should reject MCI's Petition.

Respectfully submitted,

BELLSOUTH CORPORATION

Its Attorneys



M. Robert Sutherland
A. Kirven Gilbert III

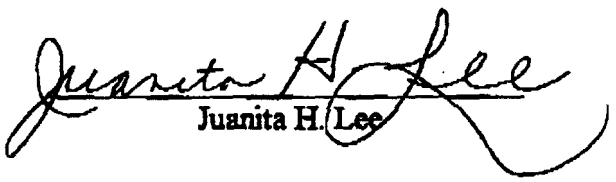
Suite 1700
1155 Peachtree Street, N.E.
Atlanta, GA 30309-3610

(404) 249-3388

DATE: April 15, 1997

CERTIFICATE OF SERVICE

I hereby certify that I have this 15th day of April, 1997 served the following parties to this action with a copy of the foregoing BELLSOUTH COMMENTS by hand delivering a true and correct copy of the same addressed to the parties below.



Juanita H. Lee

*Janice Myles
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 544
Washington, D.C. 20554

*ITS
2100 M Street, N.W.
Room 140
Washington, D.C. 20037

* Hand Delivery